IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M 114/96

BETWEEN HATSWOOD INVESTMENTS LIMITED

Applicant

AND CHRISTOPHER BENJAMIN FLANNIGAN and JENNIFER ELLINOR FLANNIGAN

First Respondents

AND ROSSPARTNERS SOLICITORS NOMINEE COMPANY LIMITED

Second Respondent

Counsel: D.L. Mathieson QC, for Applicants
P.J. Andrews for First and Second Respondents

AND M 111/96

HATSWOOD INVESTMENTS LIMITED

Applicant

AND J R BERKETT, D M PRITCHARD, D F GAULT and N BERKETT

First Respondents

AND ROSSPARTNERS SOLICITORS NOMINEE COMPANY LIMITED

Second Respondent

Hearing: 3 April 1996

Counsel: D.L. Mathieson QC, for Applicants
Miss Lim for First Respondent
P.J. Andrews for Second Respondents

ORAL JUDGMENT OF MASTER J.C.A. THOMSON

Solicitors:
Buchanan Lakshman, Wellington, for Applicant
Gault Mitchell & Co, Wellington, for First Respondent
Kensington Swan, Wellington, for Second Respondents

The applicant, Hatswood Investments Limited applies under s.145 of the Land Transfer Act 1952 for an order first that caveat B 497185.1 lodged against certificates of title 33A/620 and 45D/582 Wellington Registry, not lapse.

In a second application it also applies for an order that the caveat not lapse against certificates of title 33A/621, 33A/622, 33A/623 and 33A/624. The caveat is lodged on the grounds that on 19 December 1995 Hatswood entered into an agreement for sale and purchase to purchase the six titles the subject of its caveat. The present registered proprietor of the lands is Ian Alexander Ross. He is also a director of Hatswood and made the affidavit in support of the applications. The titles are subject to first and second mortgages to Rosspartners Solicitors Nominee Company Limited. The first mortgage was registered on 1 August 1991 and a second mortgage on 1 October 1993. On 3 April 1995 the Wellington District Law Society resolved to remove Wayne Ross and C.G. O'Connor as directors of the Nominee Company and appoint new directors. Ian Alexander Ross, the registered proprietor of the land is the father of Wayne Ross. The first mortgage secures the sum of $486,000, the second mortgage is for $106,000. The mortgagor is seriously in default in respect of the first mortgage which he should have repaid on 1 August 1994. He is also in default of instalments of interest due under the second mortgage and has been since January 1994.

Default notices were served on him under the Property Law Act 1952 and when not complied with a mortgagee auction sale was set up for 15 October 1995. Before the auction sale counsel for Wayne Ross approached the directors with a proposal which involved the contributors to the mortgages who wished to retain their investments buying out the interests of those contributors who wished to withdraw. To give the proposal an opportunity to be implemented the auction sale was postponed and certain conditions were agreed upon on which the sale

would be postponed and the buy out proposal implemented. These were not met and the mortgagee sale was re-scheduled for 16 December 1995. On 14 December 1995 a caveat was lodged against the titles by a Brian Charles Davis. That caveat refers to an agreement for sale and purchase said to have been entered into on that day. No steps have been taken to preserve that caveat. The properties were put up as three parcels; 166 hectares being titles 33A/621, 33A/622, 33A/623 and 33A/624; 102 hectares being title 33A/620 and 9.6970 hectares being the land in certificate of title 45D/582. They were sold to Kim Feickert and Ian Alexander Ross as agents. The purchases prices were $390,000, $335,000 and $155,000, a total of $880,000. Ten percent deposit cheques were tendered together with stamp duty. However payment of the cheques was stopped on 19 December 1995. Cancellation of contract notices were therefore immediately issued.

The properties were subsequently sold. The first parcel to Burkett, Pritchard and Gould, the second and third parcels to the Flannigans. Settlement has been completed and transfers lodged for registration. The purchase prices being $343,000 and $450,000 respectively, a total of $793,000. Hatswood claims to be an investor in Rosspartners Solicitors Nominee Company and in his affidavit Ian Ross says Hatswood is currently the largest contributor to the first mortgage over the property. However Mr Bacon, solicitor for the Nominee Company, has filed an affidavit listing the contributors to the mortgage that shows Hatswood's contribution is $42,000. There are at least three lenders who have contributed larger sums. Ian Ross also alleges that the majority of the contributors to the mortgage did and do not want mortgagee sales to go ahead. The extent of support for that stance is however disputed by the present directors of the Nominee Company. They say two fifths of the contributors by value of the first mortgage support the mortgagee sale proceeding and that contributors totalling $78,000 who are shown as having signed in favour of the sales not proceeding

were signed for by Ian Ross or Wayne Ross who had a vested interest in postponing the sales. The statement attached to Mr Bacon's affidavit shows that interest outstanding on the first mortgage as at 2 April 1996 is $200,671. It increases at a daily rate of $224.45. Interest on the second mortgage outstanding is $39,106.43, the daily rate being $37.86. The total of principal and interest due on the mortgages is $831,771.51. Mr Bacon says if the matter is settled now the first mortgagees would get all their principal and interest. The second mortgage would lose $44,000, in effect, their interest. Clearly if the matter is dragged on the situation will rapidly deteriorate. The agreement relied on by Hatswood is dated 19 December 1995. The purchase price is stated to be $855,000 and settlement is due on 1 July 1996. The agreement is stated to be entered into to protect the investors in Ross Nominee Company Limited who have advised the Wellington Law Society that they wish to extend the term of the mortgage and that the majority of investors wish to resolve the investment directly with the mortgagor and the agreement is executed on that basis.

The law is clear in this area. Ever since Re ***Eade*** (1882) NZLR1 SC 258 it has always been held that the Court should not determine the rights of the parties on a summary application and upon conflicting affidavits. The law is for present purposes succinctly stated in ***Sims v. Lowe*** (1981) 1 NZLR 659-660.

> "It is clear that this summary procedure for the removal of a caveat against dealings is wholly unsuitable for the determination of disputed questions of fact. From this is follows, and has been consistently held, that an order for the removal of such a caveat will not be made under 2.143 unless it is patently clear that the caveat cannot be maintained either because there was no valid ground for lodging it or that such valid ground as then existed no longer does so. See eg *Plimmer Bros v St Maur, Re Caveat No 2538* (1906) 26 NZLR 294, 296; *Catchpole v Burke* (1974) 1 NZLR 620, 623-624, 625 (a case under s 145); *Mall Finance & Investment Co Ltd v Slater* (1976) 2 NZLR 685, 686, 688. The patent clarity referred to will not exist where the caveator has a reasonably arguable case in support of the interest claimed. *Catchpole v Burke, New Zealand Limousin Cattle Breeders Society Inc v Robertson* (1984) 1 NZLR

41, 43 and *Holt v Anchorage Management Ltd* (1987) 1 NZLR 108 show that the same test applies to both s.143 and s.145.

It was said in *Re Peychers' Caveat* (1954) NZLR 285, 288 that the onus of establishing a right to removal of a caveat under s.143 rests on the applicant for removal. With respect, we do not think this can be right. The caveator seeks to clog or fetter the proprietary interest of another. As a matter of principle it seems right that he must justify the continued existence of his caveat. He will do that if he can show he has a reasonable arguable case for the interest he claims. The issue is the same as that which arises under s.145. The onus under s.143 should lie on the caveator."

On the face of it the applicant having entered into a sale and purchase agreement with the registered proprietor was entitled to lodge its caveat. The question is, is it entitled to sustain it. I do not think it is. I think the matter boils down to one of competing priorities. Clearly the mortgages are hopelessly in default and the position gets worse by the day. Having issued default notices under the Property Law Act the Nominee Company was entitled to proceed to a mortgagee sale which it did. It is significant that the registered proprietor purported to enter into the agreement that he did after the default notices were served and not complied with. I have no difficulty in finding that the sales entered into by Rosspartners Nominee Company are valid and have priority over the agreement entered into by Hatswood with Mr Ian Ross.

That the mortgagees had an indefeasible right to sell is clear from the authority of ***National Mutual Finance v. Margaret Berryman*** (unreported Wellington High Court M451/91).

I did not understand Mr Mathieson to contend otherwise. He received instructions at the 11th hour to argue that:

(a) the original mortgage was orally and validly varied so that the moneys non-payment of which was rlied on in the PL Act notice was not payable on the originally stipulated dates; or

(b) payment of interest on those dates was waived.

In either case by a then duly authorised director of the nominee company on behalf of that company.

Mrs Andrews answer to that argument is that if there was such an arrangement then the time to expose it was when the default notice was served. There was no challenge to it and in fact Hatswood bid at the auction and was successful. Further she says support cannot be found in the consents signed because what was being agreed to was not spelt out in them. I also think there is strength in the argument that such an arrangement would appear to be a breach of the Solicitors Nominee Company Rules.

To the extent that the preponderance of authority favours the view that the balance of convenience is to be considered on an application to extend or remove a caveat I find such balance clearly favours removal because:

1 On the face of it the directors have acted lawfully in conducting the mortgagee auction sale and effected valid sale and purchase agreements which have been settled.

2 Hatswood had the opportunity to bid at the auction and indeed was the successful purchaser at a purchase price of $880,000 (which incidentally was $25,000 more than the purchase price stipulated in its agreement for sale which it seeks to have upheld). However it is clear that Hatswood bid at the auction for the sole purpose of sabotaging the sale. It did not act in good faith in participating in the auction.

3 There is no information before the Court to show Hatswood will be able to settle on 1 July. It is apparent settlement will be dependent upon cooperation from the contributors to extend or give a new mortgage. Such cooperation is unlikely to be forthcoming from at least two fifths of the mortgagees by value and more than that if the contributors whose consent has been signed for by Ian and Wayne Ross as agents is discounted. By my calculation on 1 July 1996 accumulating interest on the mortgages will have eaten up the equity in the land even if it is accepted at $880,000. If it is apparent that the substantial dispute is unlikely to be resolved by that date. Any further delay will clearly be to the detriment of contributors to the mortgages.

4 It is a serious step to interfere with the rights of a mortgagee lawfully exercised and no arguable or plain case in my view has been shown to justify that course.

5 Delay in the purchasers of the properties getting possession from the mortgagees will also cause them difficulties and hardship as set out in their affidavits.

6 Whilst there may be disgruntled contributors it is difficult to see how at least the first mortgagee contributors interests are jeopardised when they will be paid out in full from the proceeds of the sales. If they consider the present directors of Rosspartners Solicitors Nominee Company Limited have acted in some way against their best interests then they have other remedies available. There can be no question that under the Solicitors Nominee Rules the directors were clearly entitled to act as they did.

7 I also think that although the fact that the agreement relied on by Hatswood would be a breach by s.10(e) of the mortgage, and the fact that the rates have not been paid could not be relied on as defaults to dispose of these applications they are matters to be weighed in considering the balance of convenience. In other words, I do not think that such breaches should simply be ignored in the exercise of the Court's discretion.

The result is that the applications to preserve the caveat fail and they are dismissed. The respondents are entitled to costs of $1,500 and disbursements as fixed by the Registrar.